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No. 84-1116

In The
Supreme Court of the United States
October Term, 1984

STATE OF LOUISIANA,
Petitioner,
vs.
CHARLES JACKSON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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QUESTIONS PRESENTED

I. Whether this Honorable Court lacks jurisdiction of this case since the charges against the Respondent which formed the basis of the dispute herein have been formally dismissed by Applicant, the State of Louisiana, and therefore the case is moot since there is no longer a live "case or controversy" between the parties as required by Article III of the United States Constitution.

II. Whether this Honorable Court lacks jurisdiction of this case since the decision of the Louisiana Supreme Court was based upon the Constitution of the State of Louisiana, Article 1, Section 5, and therefore the case was decided upon an "independent and adequate state ground" outside the jurisdiction of this Court.

III. Whether the illegal stop, arrest, detention, and confinement of the Respondent irreparably tainted any purported consent by the Respondent.

PARTIES TO THE PROCEEDING BELOW

All parties appear in the caption of the case in the United States Supreme Court.

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STATEMENT OF THE CASE

On January 6, 1983, Respondent, Mr. Charles Jackson, arrived at the New Orleans International Airport on Delta Airline flight # 1164 originating in Los Angeles, California. Upon disembarking from the plane, the Respondent was randomly and arbitrarily chosen for observation by two narcotics agents, Agent Farrell Whitehead and Agent James Hurley, employed by the Jefferson Parish Sheriff's Office, Jefferson Parish, Louisiana. Respondent, a young black male dressed in a suit, fit the profile of a drug courier according to the subjective impression of the officers. The two agents followed Mr. Jackson to the baggage area of the airport. While following the Respondent to the baggage area, the agents observed that Mr. Jackson walked slowly down the concourse, entered a restroom (where they did not bother to follow him), and discarded an empty cigarette package into a waste basket (which they did not bother to retrieve).

Based on these innocent activities, both officers approached Mr. Jackson and identified themselves as police officers. They informed the Respondent that he was suspected of carrying narcotics and asked permission to search his luggage. The Respondent flatly refused permission to search his luggage. At that time the two officers took Mr. Jackson and his luggage into custody and led him up three flights of stairs to a small police interrogation room located at the airport. While in the interrogation room they searched the Respondent and discovered one small alleged marijuana cigarette. They then stated he was under arrest for possession of marijuana and again demanded permission to search his luggage. The

agents told Respondent that the obtaining of a search warrant would be but a mere formality. Mr. Jackson finally submitted to the demands of the agents and they proceeded to search his luggage. Subsequently, the substances that were the focus of the criminal prosecution were discovered.

On February 14, 1983, the District Attorney for the Parish of Jefferson, State of Louisiana, filed a Bill of Information charging Mr. Charles Jackson with a violation of Louisiana Revised Statute 40:967(a). Following his arraignment on March 16, 1983, the Respondent filed a Motion to Suppress the Evidence seized by the two agents. This motion was heard on July 20, 1983, before the Honorable Wallace C. LeBrun, Judge for the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, Section "I". At the suppression hearing, the State called the two police officers involved in the seizure who testified as to the facts set forth above. The only witness called by defense counsel was the Respondent, Mr. Charles Jackson. At the conclusion of the testimony, the trial court requested that both the State and the Respondent submit supporting memorandums outlining the law in this area. The Respondent submitted his memorandum on August 10, 1983. The State failed to file any supporting memorandum. On September 10, 1983, the trial court denied the Motion to Suppress brought by the Respondent based on his finding that the police officers involved had "exercised subjective good faith in the search of Charles Jackson's luggage and as such possessed a reasonable belief in the veracity of their probable cause determination". *Illinois v. Gates*, 462 U.S. 413 (1983).

On December 23, 1983, Respondent appealed the decision of the trial court to the Court of Appeal, Fifth Circuit, State of Louisiana, by applying for a Supervisory Writ of Review. The Writ was denied on January 3, 1984. The Court directed the Respondent to review the recent Fifth Circuit decision in *State v. Ossey,* 435 So.2d 1039 (La.App. 5th Cir. 1983).

On January 12, 1984, Respondent appealed the decision of the Court of Appeal, Fifth Circuit, State of Louisiana, by applying for a Supervisory Writ of Review to the Supreme Court of the State of Louisiana. The Louisiana Supreme Court granted the Writ on February 16, 1984, and remanded this case back to the Fifth Circuit for briefing, argument and opinion. 445 So.2d 455 (La. 1984). This was a unanimous decision of the Louisiana Supreme Court. The Court instructed the Fifth Circuit to review this case in light of *State v. Ossey,* 446 So.2d 280 (La. 1984), which the Supreme Court found to be distinguishable on the facts from the instant case.

On March 16, 1984, Respondent filed his brief with the Court of Appeals, Fifth Circuit, State of Louisiana. On remand, the Fifth Circuit denied the appeal of the Respondent on May 3, 1984. 452 So.2d 703 (La. App. 5th Cir. 1984). This decision by the Fifth Circuit was rendered without oral argument despite the directive of the Louisiana Supreme Court to review this case with briefing and argument.

On July 19, 1984, Respondent filed an Application for Writ of Supervisory Review with the Louisiana Supreme Court. This Writ of Supervisory Review with the Louisiana Supreme Court. This Writ was granted by the Louisi-

ana Supreme Court on October 15, 1984. In a six-one decision written by Justice Blanche, the Louisiana Supreme Court held that:

> "We regard the officers actions in taking Jackson into custody without his consent for the purpose of further interrogation as going beyond the limits of a permissible investigatory stop and constituting an arrest without probable cause. Accordingly, any evidence discovered as a result of this illegal detention, whether with or without Jackson's consent, was tainted and should have been suppressed." 457 So.2d 660 (La. 1984), at 664.

Following the decision by the Louisiana Supreme Court, on November 20, 1984, the District Attorney for the Parish of Jefferson, State of Louisiana, dismissed the Bill of Information against Mr. Charles Jackson, discharging the Respondent from any further criminal prosecution. Following the dismissal of the charges against the Respondent, Applicant, the State of Louisiana, filed a Petition For Writ Of Certiorari with this Honorable Court on December 14, 1984. Applicant filed the Petition For Writ Of Certiorari in improper form and was granted an extension of time to file the Application in proper form. On January 10, 1985, Applicant, the State of Louisiana, filed the instant Petition for Writ of Certiorari in proper form with this Honorable Court. On February 27, 1985, the Clerk of Court for this Honorable Court informed the Respondent that a response was due in this matter on or before March 29, 1985. The following Response is submitted in compliance with that request.

REASONS FOR DENYING THE WRIT

I. This Honorable Court Lacks Jurisdiction Of This Matter Since The Charges Against The Respondent Have Been Formally Dismissed By Applicant, And Therefore The Case Is Moot Since Their Is No Longer A Live "Case Or Controversy" Between The Parties As Required By Article III Of The United States Constitution.

Respondent respectfully submits that this Honorable Court should deny the instant Petition for Writ of Certiorari based upon the fact that Applicant, the State of Louisiana, has already formally dismissed the charges against the Respondent. The dismissal of the charges by the State of Louisiana has rendered the case moot, and therefore there is no longer pending a live "case or controversy" giving this Court jurisdiction of this matter under Article III of the United States Constitution.

On November 20, 1984, the District Attorney for the Parish of Jefferson, State of Louisiana, filed a written dismissal of the charges against Respondent with the Clerk of Court for the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana. Thereafter, the Clerk of Court of the 24th Judicial District Court, Parish of Jefferson, State of Louisiana, entered the dismissal in a Minute Entry filed into the record of this matter. A certified copy of this dismissal is attached hereto as Appendix "A". A certified copy of the Minute Entry is attached hereto as Appendix "B". Pursuant to Louisiana Code of Criminal Procedure Article 691, a District Attorney has the power to dismiss an indictment or charges filed in a bill of information. Article 691 provides that:

> "The district attorney has the power, in his discretion, to dismiss an indictment or a count in an indictment, and in order to exercise that power it is not necessary that he obtain consent of the court. The dismissal may be made orally by the district attorney in open court, or by a written statement of the dismissal signed by the district attorney and filed with the clerk of court. The clerk of court shall cause the dismissal to be entered on the minutes of the court." La.Code Crim. Pro. art. 691.

Once the indictment or bill of information has been dismissed in this manner, the District Attorney must obtain a new indictment or file a new bill of information in order to prosecute the accused for the offense charged in the prior indictment or bill of information. Respondent shows this Honorable Court that no new charges have been filed against him in this matter prior to Applicant filing the instant Petition for Writ of Certiorari.

It is respectfully submitted that this Honorable Court lacks jurisdiction to review this case. Under Article III of the United States Constitution, the exercise of federal judicial power depends upon the existence of a case or controversy. *Liner v. Jafco,* 375 U.S. 301 (1964). As set forth above, there is no case or controversy existent since Applicant has dismissed all charges against Respondent. Therefore, any ruling by this Honorable Court could have no effect on the original case and the upholding of the Motion to Suppress the Evidence by the Louisiana Supreme Court. A ruling by this Court would clearly be an "advisory opinion on abstract propositions of law". *Hall v. Beals,* 396 U.S. 45 (1965). Therefore, in light of the foregoing reasons, Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari filed by the State of Louisiana.

II. This Honorable Court Lacks Jurisdiction Of This Matter Since The Decision Of The Louisiana Supreme Court Was Based Upon The Constitution Of The State Of Louisiana, Article 1, Section 5, And Therefore The Case Was Decided Upon An "Independent And Adequate State Ground" Outside The Jurisdiction Of This Court.

Respondent respectfully submits that this Honorable Court should deny the instant Petition for Writ of Certiorari since the judgment of the Louisiana Supreme Court was based upon Louisiana State Constitution Article 1, Section 5, an independent and adequate state ground. The basis of the decision by the Louisiana Supreme Court to suppress the evidence in this matter was a finding by the Court that the Respondent was the victim of an unlawful arrest, detention, search and seizure. In holding the Respondent had been illegally detained and searched, the Court cited the Louisiana state decisions of *State v. Key,* 375 So.2d 1354 (La. 1979), *State v. Matthews,* 366 So.2d 1345 (La. 1978), and *State v. Washington,* 364 So.2d 958 (La. 1978). It should be noted that all of these cases were decided prior to *United States v. Mendenhall,* 446 U.S. 544 (1980) and *Florida v. Royer,* 460 U.S. 491 (1983). A brief outline of these cases will be sufficient to demonstrate the scope of Louisiana state law concerning airport searches and seizures.

In *State v. Washington,* 364 So.2d 958 (La. 1978) the Louisiana Supreme Court held that narcotics uncovered subsequent to an illegal airport stop, arrest, and detention had to be excluded from evidence at trial. In *Washington,* two narcotics agents assigned to New Orleans International Airport observed the defendant disembark from an airplane flight which originated in Los Angeles,

California. They observed the defendant walk down the concourse of the airport, go into a restroom, and use a telephone. The officers noted that the defendant appeared nervous. When Washington attempted to leave the baggage area, the agents stopped the defendant and asked for his airplane ticket and identification. The officers noted that the airplane ticket was in a different name than the identification. Based on these facts, the agents took Washington to the police interrogation room located at the airport. They requested permission to search his luggage, which the defendant refused. The officers then took the suitcase to the baggage counter and had a trained dog sniff the luggage. Upon smelling the suitcase, the dog seized the bag and barked. The agents obtained a search warrant based upon the actions of the trained canine. Upon searching the suitcase, the police officers discovered heroin. In holding that the evidence discovered had to be suppressed from the trial in this matter, the Louisiana Supreme Court stated that:

> "These facts upon which the stop was based are at least equally consistent with innocent behavior, such as the actions of a deplaning passenger expecting to be met at the airport by someone he does not find there. They do not furnish reasonable cause to suspect the individual of unlawful activity on the basis of specific and articuable facts sufficient to furnish subjective grounds for the police suspicion, as is constitutionally and statutuorily required before governmental agents may stop an individual and infringe upon his right to be left alone. *State v. Davis,* 359 So.2d 986 (La. 1978); *State v. Ryan,* 358 So.2d 1274 (La. 1978)." 364 So.2d at 959, 960.

The Court went on to hold as follows:

> "The evidence obtained as the direct result of this unlawful stop, based upon then-unfounded sus-

> picion, is tainted and thus constitutionally inadmissible into evidence against the accused. *State v. Davis*, 359 So.2d 986 (La. 1978); *State v. Smith*, 347 So.2d 1127 (La. 1977)." 364 So.2d at 960.

It should be noted that in the above decision, the Louisiana Supreme Court did not cite any federal constitutional law or federal cases, but instead depended entirely upon Louisiana state law.

In *State v. Matthews*, 366 So.2d 1348 (La. 1978), the Louisiana Supreme Court again held that narcotics uncovered subsequent to an illegal airport stop, arrest and detention had to be excluded from evidence at trial. In *Matthews*, two narcotics agents for the Jefferson Parish Sheriff's office, Jefferson Parish, Louisiana, assigned to New Orleans International Airport observed the defendant disembark from Delta Airlines flight #1080 originating in Los Angeles, California. The officers alleged that they had received information from a confidential informant concerning the description of a drug courier transporting narcotics from Los Angeles, California to New Orleans, Louisiana. Since the defendant fit the alleged description, i.e., a young black male of average height and weight, the agents placed him under surveillance. They observed that he was nervous, looked over his shoulder several times, and claimed only one piece of luggage at the baggage claim area. The officers then approached Matthews and asked him to identify himself. The defendant gave an assumed name. The agents then asked for an airplane ticket. The defendant denied having a ticket, but the officers pointed out that an airplane ticket was protruding from his coat pocket. The ticket was in the name of Michael Matthews. The officers then es-

corted Matthews to the police room located at the airport. Once in the room, the agents again requested identification. The defendant replied that his wallet was in his suitcase. When Matthews opened his suitcase, the officers observed a plastic bag containing numerous foil wrapped packages. The agents seized the suitcase, searched it, and discovered PCP. The defendant was then placed under formal arrest.

In holding that the evidence was unlawfully obtained and must be suppressed, the Louisiana Supreme Court stated that:

> "The investigating officers did not have reasonable cause to suspect Michael Matthews of unlawful activity. At the time the stop was made, the officers knew the defendant had arrived on a flight from Los Angeles; that he appeared nervous and evasive; that he did not surrender his baggage claim check when he picked up his suitcase. Additionally, the officers had received a very vague description of a suspecting heroin courier. Insofar as the record discloses, the investigating officers were not aware whether the original source of the information was a credible person or the information itself was reliable. Accordingly, the specific and articuable facts known to the officers before the investigatory stop, together with the rational inferrences which might be drawn from those facts, did not warrant their intrusion upon Michael Matthews' right to be secure in his person against an invasion of his privacy." 366 So.2d at 1352.

In *State v. Key*, 375 So.2d 1354 (La. 1979), the Louisiana Supreme Court again held that narcotics uncovered subsequent to an illegal airport stop, arrest and search had to be excluded from evidence at trial. In *Key*, two narcotics agents stopped the defendant at the New Orleans International Airport based on the following ob-

servations. The officers observed the defendant arrive on a flight originating in Los Angeles, California. The agents noted that he seemed nervous and evasive. An airline employee had informed the officers that the defendant appeared in a hurry at the Los Angeles Airport ticket counter and nervously paid for his fare to New Orleans, Louisiana in small bills. The agents were aware that the defendant had been arrested in 1977 at the Atlanta Airport for possession of heroin. The officers detained Key after he jogged into an airport restroom to use the urinal. A search of the defendant revealed cocaine rolled up in his sleeve.

In holding the evidence was unlawfully obtained, the Louisiana Supreme Court stated that:

> "The officers had no information upon which to base a reasonable belief that the defendant was engaged in illegal activity at the time they stopped him. A mere suspicion arising from his prior arrest did not entitle the officers to believe that the accused was presently engaged in any illegal activity. The remaining conduct of the defendant was just as consistent with innocent as with illicit behavior. It did not provide the specific and articulable facts indicating criminal conduct sufficient to justify the instant investigatory stop. *State v. Matthews*, 366 So.2d 1348 (La. 1978); *State v. Washington*, 364 So.2d 958 (La. 1978)." 375 So.2d at 1355.

It should be noted that in *Key* the Louisiana Supreme Court cited only Louisiana State Constitution Article I, Section 5, and the decisions of *Matthews* and *Washington,* supra. The Court relied solely on Louisiana state law and not on federal law.

Finally, in *State v. Ossey,* 446 So.2d 280 (La. 1984), the Louisiana Supreme Court upheld the denial of a Mo-

tion to Suppress the Evidence by a trial judge. In *Ossey,* the Louisiana Supreme Court upheld the search and seizure of the defendant and his luggage based upon its finding that the defendant had consented to the investigatory stop and detention and the subsequent search of his luggage. In the instant case, the Louisiana Supreme Court distinguished *Ossey* on the issue of the voluntary cooperation and consent of the defendant. This issue will be more fully addressed in part III of this Response. It is sufficient at this time to note that in *Ossey* the Louisiana Supreme Court did not address the application of Louisiana State Constitution, Article I, Section 5, or relevant Louisiana state court cases in its decision.

With the exception of *Ossey,* the decisions of the Louisiana Supreme Court in the above cited cases rested upon Louisiana State Constitution Article I, Section 5. Article I, Section 5 provides that:

> "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court."

In *Delaware v. Prouse,* 440 U.S. 648 (1979), this Court considered whether Article I, Section 6 of the Delaware State Constitution constituted an independent and adequate state ground from the Fourth Amendment to the United States Constitution. In holding that the above

cited state constitutional provision did not constitute an independent and adequate ground this Court stated that:

> "As we understand the opinion below, Art. I, Clause 6, of the Delaware Constitution will automatically be interpreted at least as broadly as the Fourth Amendment; that is, every police practice authoritatively determined to be contrary to the Fourth and Fourteenth Amendment will, without further analysis, be held to be contrary to Art. I, Clause 6. This approach, which is consistent with previous opinions of the Delaware Supreme Court, was followed in this case. The court analyzed the various decisions interpreting the federal constitution, concluded that the Fourth Amendment foreclosed spot checks of automobiles, and summarily held that the State Constitution was therefore infringed. This is one of those cases where 'at the very least, the [State] court felt compelled to what it understood to be a federal constitutional consideration to construe. . . . its own law in the manner it did'. *Zacchini v. Scrips-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)." 440 U.S. at 4.

This court stated in a footnote that:

> "We have found only one case decided after *State v. Moore, Supra,* in which the court relied solely on state law in upholding the validity of a search or seizure, and that case involved not only Del. Const. Art. I, Clause 6, but also states statutory requirements for issuance of a search warrant, *Rossitto v. State,* 234 A.2d 438 (1967). Moreover, every case holding a search or seizure to be contrary to the state constitutional provision relies on cases interpreting the Fourth Amendment and simultaneously concludes that the search or seizure is contrary to that provision." (Citations omitted). 440 U.S. at 4, fn. 4.

The instant case is clearly distinguishable from *Delaware v. Prouse.* The state constitutional provision at is-

sue in this case provides a more stringent standard for searches and seizures than the Fourth Amendment to the United States Constitution. The Louisiana Supreme Court has unequivocably interpreted Louisiana State Constitution Article 1, Section 5, to provide a higher standard of individual liberty than that afforded by the Fourth Amendment to the United States Constitution. In *State v. Hernandez,* 410 So.2d 1381 (La. 1982), the Louisiana Supreme Court held that:

> "Furthermore, the search of the defendant's automobile, without probable cause, and in the absence of any of the circumstances which have been recognized by this court as justifying a narrow exception to the warrant requirement, plainly constituted an unreasonable search, seizure or invasion of privacy in violation of Article 1, Clause 5 of the 1974 Louisiana Constitution. Although the *Belton* case is distinguishable and therefore inapplicable here, it should be noted that we do not consider it to be a correct rule of police conduct under our state constitution. We, of course, give careful consideration to the United States Supreme Court interpretation of relevant provisions of the federal constitution, but we cannot and should not allow those decisions to replace our independent judgment in construing the Constitution adopted by the people of Louisiana. (See La. Const. of 1974 preamble; Art. 1, Clause 1). Our state constitution's declaration of the right to privacy contains an affirmative establishment of a right to privacy, explicit protections against unreasonable searches, seizures or invasions of property and communications, as well as, houses, papers and effects, and gives standing to any person adversely affected by a violation of these safeguards to raise the illegality in the courts. La. Const. 1974, Art. 1, Clause 5. This constitutional declaration of right is not a duplicate of the Fourth Amendment or merely coextensive with

it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution. See *State v. Abram,* 353 So.2d 1019 (La. 1978); *State v. Hutchinson,* 349 So.2d 1252 (La. 1977); *State v. Overton,* 337 So.2d 1201 (La. 1976); Hargrave, *The Declaration of Right of the Louisiana Constitution of 1974,* 35 La. L.Rev.1 (1974); Jenkins, *The Declaration of Rights,* 21 Loy.L.Rev. 27 (1975)." 410 So.2d at 1385.

Evidence seized in violation of Louisiana State Constitution Article 1, Section 5, must be excluded from a criminal prosecution. *State v. Key,* supra; *State v. Matthews,* supra; *State v. Washington,* supra. Thus, even assuming, *arguendo,* that this Court finds that the evidence was not obtained in violation of the Fourth Amendment to the United States Constitution, the evidence will be excluded pursuant to Louisiana State Constitution, Article 1, Section 5. It is therefore clear that the decision of the Louisiana Supreme Court was based upon an independent and adequate state ground Therefore, Respondent respectfully requests this Honorable Court to deny the instant Petition For Writ Of Certiorari based upon the ground that the decision of the Louisiana Supreme Court was based upon an independent and adequate state ground, and that therefore, this Honorable Court does not have jurisdiction of this case.

III. The Illegal Stop, Arrest, Detention, And Confinement Of The Respondent Irreparably Tainted Any Purported Consent By The Respondent.

A. The Police Officers In This Case Did Not Have Reasonable Objective, Articuable Suspicion Of Criminal Activity To Justify The Investigatory Detention Of Respondent, Nor

Did They Have Probable Cause Or Exigent Circumstances Necessary To Justify A Warrantless Arrest.

At the suppression hearing held in this case, Agents Whitehead and Hurley testified that they initially approached Respondent based upon the following facts:

1.) Respondent was a passenger on an airplane flight originating in Los Angeles, California, carrying over two hundred passengers;

2.) Respondent walked slowly through the airport concourse, stopped in a restroom, and discarded a cigarette pack in a waste receptacle;

3.) Respondent claimed one piece of luggage from the baggage claim area.

Based on these innocent activities, the police officers approached Respondent, identified themselves as narcotics agents, and requested identification and an airplane ticket from Respondent. Respondent provided neither identification nor an airplane ticket to the officers. Respondent was not under any duty to provide such information to the agents, and his failure to furnish this information did not, without more, provide further grounds for the police officers to detain him. *United States v. Mendenhall,* 446 U.S. 544 (1980) at 556. The officers asked Respondent for permission to search his luggage. Respondent flatly refused. Agent Whitehead then informed Respondent that the agents strongly suspected that Respondent was transporting narcotics. At that time, Agent Hurley seized the luggage belonging to Respondent and the agents told Respondent to accompany them to their office on the third

floor of the terminal while the officers prepared a search warrant for the luggage.

At the suppression hearing, Agent Hurley testified concerning the above described encounter as follows:

Q. Now, at some point, after not having his I.D., you made a determination, based on his not having I.D. and the other things you've stated, to take him to the Narcotics Office, correct?

A. We had a strong belief that he was probably transporting narcotics and that's why we took him—we escorted him to our office with the bag, for the simple reason that we were going to secure a search warrant for the bag and there would have been no way for us to return the bag to someone without having some type of identification, he wasn't under arrest at the time, no.

Q. Were you prepared to seize the bag?

A. We were prepared to detain it long enough to get a warrant for it, yes sir.

Q. Now, and at that point, you informed him that he was going to be escorted to the Narcotics Office that is located there—

A. Yeah, it's on the third floor.

Q. And a search warrant prepared for review and application by a Judge and that a search warrant would be executed. He was going to be taken to the office while all of this was done?

A. Yeah, detain him there long enough for us to identify him and secure the warrant.

Transcript of Hearing on Motion to Suppress of July 20, 1983 at page 15, line 2 through line 22. Questions by Mr. Ralph Capitelli, answers by Agent James Hurley.

From the above synopsis of events, it is readily apparent that the officers did not have a reasonable, objective, articuable suspicion of criminal activity to justify a stop under the precepts of *Terry v. Ohio,* 392 U.S. 1 (1968), let alone enough facts to justify a warrantless search and seizure of Respondent and his luggage. It is also clear that the actions of the police officers went far beyond the limited intrusion countenanced in a *Terry*-type stop. Agent Hurley testified that they "took . . . . him to our office with the bag . . . ." and that the agents were prepared to "detain him long enough for us to identify him and secure the search warrant". Police officers, while investigating a person who is merely suspected of criminal activity, may not seek to verify their suspicious by means that approach the conditions of arrest. *Dunaway v. New York,* 442 U.S. 200 (1979). In this case, at the point that the agents seized the baggage belonging to Respondent and told him to accompany them to their office, he was under arrest for all practical purposes.

As a side note, though not germane to the legality of the stop and arrest, the officers allegedly discovered a small amount of marijuana contained in the sock of the Respondent during a pat down search of Respondent following the arrest. Though police officers may search an individual during a *Terry*-type stop to assure their personal safety, the search is limited to a search for weapons. In the instant case, the agents had observed Mr. Jackson disembark from a commercial airplane flight where they knew or should have been aware that he could not have been carrying a weapon due to the various anti-hijacking devices. The officers kept Mr. Jackson under constant surveillance between his arrival in New Orleans

until the arrest. The only time that Respondent was outside the view of the agents is when he entered a restroom where the agents apparently did not feel a necessity to follow him. Therefore, the officers could not have feared for their personal safety prior to the pat down search of Mr. Jackson. In addition, the agents testified that the alleged marijuana was contained in a soft package and therefore could not have been mistaken for a weapon. Thus, the evidence obtained in the pat down search would be excluded even if the original stop and arrest were valid.

At the suppression hearing held in this matter, Respondent testified concerning the encounter at issue herein as follows:

> "When I arrived to the terminal, I was confused. I didn't know where to go, because this was my first time walking down that terminal; okay, I'm walking around—I'm trying to find the baggage claim area, so I walked to the baggage claim area; I went in the bathroom, I came out, I dropped an empty cigarette pack into the waste can, still looking for the baggage claim area, cause I'm walking down the terminal, so it was hot, I'm walking slow, you know, it's hot here, to me, I'v never been in this heat before: and I walked down the steps and I find the baggage claim area and I'm still looking around for the luggage to come off the conveyor belt; it's different than the Los Angeles Airport, and when I discovered where it was at, I walked over and picked up the bag, walked out and stood, I don't know, stood up, I was looking for a cab after that; so I stood, not outside the door, but in—pretty close to the door inside the terminal. Officer Whitehead walked up to me with a badge in his hand, I didn't discover Officer Furley (sic) till

I walked back inside with Officer Whitehead. He was there, though, close by, but I didn't see him. So he asked me could he search the luggage. I said, "No." So we went upstairs. He said, "Well, I'm going to have to take you upstairs to my office and retain a search warrant; so I went up there with him."

Q. He told you he was going to have to take you upstairs 'cause he was going to obtain a search warrant?

A. Right.

Q. At that point, did you have any option or chance or opportunity to leave?

A. None whatsoever.

Q. Did he tell you you had the opportunity to leave?

A. No, at that point I felt that I was under arrest.

Q. Then you, after being escorted upstairs to this office, describe to the Court how—what this office looked like.

A. Well, it was a small room, you know; it was upstairs, it was a small room, it had two desks, like he said, and a filing cabinet, and that's it; maybe twelve by twelve, or something.

Transcript of Hearing on Motion to Suppress of July 20, 1983, at page 32, line 13 through page 33, line 21. Questions by Mr. Ralph Capitelli, answers by Respondent, Mr. Charles Jackson.

It is absurd to even suggest that a reasonable person would leave his luggage in the possession of police officers and ignore the request of the officers to accompany them to their office under the circumstances enumerated above. Therefore, these circumstances clearly amounted to a show of lawful authority such that, "a reasonable per-

son would not have believed he was free to leave". *U.S. v. Mendenhall,* 446 U.S. 554 (1979), at 554.

B. The Illegal Stop, Arrest, Detention, And Confinement Of Respondent Tainted Any Purported Consent By Respondent.

It is clear that when the validity of a search rests on consent the State has a burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority. *Lo-Ji Sales, Inc. v New York,* 442 U.S. 319, 329 (1979); *Schneckloth v. Bustamonte,* 412 U.S. 218, 233-234 (1973). A recent prior decision by this Honorable Court deals with the issue of consent to search following an illegal arrest and detention. In *Florida v. Royer,* 460 U.S. 491 (1983), this Court considered a case very similar to the instant case. A brief comparison of *Royer* to this case is helpful to the analysis herein.

In *Royer,* two narcotics agents observed the defendant in an airport terminal, just as in the instant case. The officers observed Royer purchase an airplane ticket to New York City and pay for the ticket by peeling bills off a large roll of cash. The agents noted that Royer placed only his name and destination on the airline baggage identification tag. The officers observed that Royer was young, casually dressed and appeared nervous. Based on these observations, which are clearly more indicative of criminal activity than the observations made by the agents in this case, the police officers approached Royer and demanded his airline ticket and identification. Royer produced his airline ticket and identification, and the officers

noted that the airline ticket and identification were in different names. In the instant case, Respondent did not produce his identification or airline ticket at the request of the police officers. Therefore, the police officers were not aware of any discrepancy between the name on the airline ticket and his identification prior to the illegal arrest, search and seizure. The officers then told Royer to accompany them to a small interrogation room located in the airport, just as in the instant case. However, unlike *Royer* the officers here readily admit that the accused was not free to leave, whereas in *Royer* this Court concluded that fact from the circumstances From the above facts, this Court concluded that Royer was, "Effectively seized for the purposes of the Fourth Amendment. . . . that as a practical matter, Royer was under arrest". *Florida v. Royer,* 460 U.S. at page 501.

This Court went on to hold that since Royer was being illegally detained when he consented to the search of his luggage, any consent given by Royer as to the search was tainted by the illegality of the detention and was ineffective to justify the search. 460 U.S. at pages 507, 508. It is clear from the above comparison of the two cases that the detention in this case was based upon even more specious grounds than those in *Royer.* Therefore, the search and seizure of Respondent contested herein was conducted in violation of the Fourth Amendment to the United States Constitution, and therefore any evidence seized as a result of this illegal search and seizure must be excluded from any prosecution in this matter. *Mapp v. Ohio,* 367 U.S. 643 (1961).

Respondent shows this Honorable Court that the instant case is clearly distinguishable from the case of *Flor-*

ida v. Rodriguez, 105 S.Ct. 308 (1984). In *Rodriguez,* the police observed the defendant acting "furtively" inside the airport concourse. In the instant case, the agents did not observe any such "strange movements". In *Rodriguez,* the defendant consented the search of his luggage. In the instant case, as set forth above, respondent did not voluntarily consent the search of his luggage.

CONCLUSION

Wherefore, Respondent, Mr. Charles Jackson, for the reasons set out herein, respectfully requests this Honorable Court to deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

/s/ Ralph Capitelli
Capitelli, Bencomo & Wicker
Attorney at Law
600 Julia Street
New Orleans, Louisiana 70130
Telephone: (504) 525-0720

Attorney for Respondent

VERIFICATION

I, Ralph Capitelli, am a member of the Bar of the Supreme Court of the United States and the attorney of record for Respondent in the above entitled matter.

I have read the foregoing Response and know the contents thereof.

I declare under penalty of perjury under the laws of the State of Louisiana that the foregoing is true and correct. Executed on March 26, 1985 at New Orleans, Louisiana.

/s/ Ralph Capitelli
Attorney for Respondent

PARISH OF ORLEANS
STATE OF LOUISIANA

On March 26, 1985, before me the undersigned, a Notary Public in and for said state, personally appeared Ralph Capitelli, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

/s/ T. Carey Wicker, III
Notary Public for the Parish of
Orleans, State of Louisiana

(SEAL)

APPENDIX

Appendix "A" Bill of Information filed against Mr. Charles Jackson showing formal dismissal in writing by District Attorney, Parish of Jefferson, State of Louisiana on 11-20-84.[1]

Appendix "B" Minute Entry of 11-20-84 in *State of Louisiana vs. Charles Jackson,* No. 83-604, 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, Division "I", noting dismissal of Bill of Information against Mr. Charles Jackson and discharging the Respondent.[2]

I certify that all of the appendices attached to the Response to Petition for Writ of Certiorari filed herein are true copies of what they purport to be.

/s/ Ralph Capitelli

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[1]The original Bill of Information in this matter was typeset pursuant to Rule 33. The original Bill of Information was filed with the Clerk of Court, United States Supreme Court.

[2]The original Minute Entry in this matter was typeset pursuant to Rule 33. The original Minute Entry was filed with the Clerk of Court, United States Supreme Court.

APPENDIX "A"

Bill of Information filed against Mr. Charles Jackson showing formal dismissal in writing, by District Attorney, Parish of Jefferson, State of Louisiana on 11-20-84.

THE STATE OF LOUISIANA)
) s.s.
Twenty-Fourth Judicial District)

Parish of Jefferson

Twenty-Fourth Judicial District Court

JOHN M. MAMOULIDES, District Attorney, of the Twenty-Fourth Judicial District of the State of Louisiana, who, in the name and by the authority of the said State, prosecutes in its behalf, in proper person comes into the Twenty-Fourth Judicial District Court of the State of Louisiana, in and for the PARISH OF JEFFERSON and gives the said Court here to understand and be informed that one

CHARLES JACKSON

late of the Parish aforesaid, on or about the 6th day of January in the year of our Lord One Thousand Nine Hundred and Eighty-Three (83) with force and arms, in the Parish aforesaid; and within the jurisdiction of the Twenty-Fourth Judicial District Court of Louisiana, in and for the Parish aforesaid, violated R.S. 40:967A in that he did knowingly and intentionally possess with intent to distribute a controlled dangerous substance, to wit: Phenmetrazine,

DISMISSED
EH 11-20-84

contrary to the form of the Statute of the State of Louisiana, in such case made and provided, and against the peace and dignity of the State.

/s/ Michael G. Fanning
Assistant District Attorney

COMPLAINT NUMBER A-3412-83

App. 4

(Filed February 14, 1983)

No. 83-604

THE STATE OF LOUISIANA

vs.

CHARLES JACKSON,

INFORMATION FOR

R. S. 40:967A
POSS. WITH INTENT TO DIST. A CDS

JOHN M. MAMOULIDES
District Attorney

APPENDIX "B"

Minute Entry of 11-20-84 in *State of Louisiana vs. Charles Jackson,* No. 83-604, 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, Division "I", noting dismissal of Bill of Information against Mr. Charles Jackson and discharging the Respondent.

STATE OF LOUISIANA
PARISH OF JEFFERSON

24th Judicial District Court

State of Louisiana

vs.

Charles Jackson

No. 83-604, Division I

Date 11-20-84

District Attorney Honig, Judge LeBrun

The Assistant District Attorney dismissed this pending charge. See Bill of Information.

The Defendant is discharged. Bond cancelled.

/s/ Deborah Leger
Deputy Clerk